(Y)

Supreme Court, U.S.
FILED
SEP 5 - 1995
OFFICE OF THE CLERK

No. 95-522

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GAYLE A. ROY, pro se - PETITIONER

vs.

MERIT SYSTEM PROTECTION BOARD - RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gayle A. Roy, pro se
4898 Basin Street
West Chester, Ohio 45069
(513) 860-3098

37pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Federal Circuit violate due process procedures, guaranteed under the Fourteenth Amendment to the United States Constitution, when the Court refused to consider the whole, complete record; to include the newly discovered evidence which was unavailable at the close of the record by the Merit Systems Protection Board [MSPB]?

LIST OF PARTIES

1. Petitioner: Gayle A. Roy, pro se

2. Respondent: Merit System Protection Board

   a. United States Postal Service, et al
   b. US Dept. of Labor - Office of Workers' Comp.

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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1995

Gayle A. Roy, pro se, Petitioner

vs.

Merit Systems Protection Board,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Gayle A. Roy, pro se, respectfully prays that a writ of certiorari issue to review the judgment [without opinion] of the United States Court of Appeals for the Federal Circuit, in which that court refused to consider the whole complete record (to include the newly discovered evidence which was unavailable at the close of the record by Merit Systems Protection Board - "MSPB"). Thereby violating Petitioner's right to due process.

OPINIONS BELOW

1. The denial of Petitioner's appeal to the United States Court of Appeals for the Federal Circuit, dated June 12, 1995, appears in Appendix A to this Petition.

2. The denial of Petitioner's Nunc Pro Tunc Motion (for newly discovered evidence) by the United States Court of Appeals

for the Federal Circuit, dated April 6, 1995, appears in Appendix B to this Petition.

By their own statement, the US Court of Appeals would not consider the complete record, which was unavailable prior to the close of the record by MSPB, but was submitted by this Petitioner to the US District Court.

3. Petitioner timely filed a "mixed case" suit against MSPB in United States District Court, Southern District of Ohio, Western Division, dated February 7, 1994.

District Court had jurisdiction pursuant to 42 USC §2000e-5.

After considering the complete record, to include the newly discovered medical evidence, US District Court transferred Petitioner's case to the jurisdiction of the United States Court of Appeals for the Federal Circuit under date of January 31, 1995 [Appendix C].

US District Court obviously recognized the validity of Petitioner's charges and did not dismiss Petitioner's complaint but instead transferred the case.

Transfer of jurisdiction was under 28 USC §1631.

4. This newly discovered medical evidence shows that a disability exists and Petitioner's case should not be dismissed on timeliness, as per MSPB's "initial decision" dated September 13, 1993 [Appendix D].

Merit Systems Protection Board's "final decision", dated January 12, 1994, appears in Appendix E to this petition.

5. Recently obtained medical documentation from the imminent world renowned orthopaedic surgeon Dr. Frank Noyes dated July 11, 1995 [Appendix F], further substantiates Petitioner's claims of denial of due process.

JURISDICTION

The judgment, without opinion, of the United States Court of Appeals for the Federal Circuit was filed on June 12, 1995.

This Court's jurisdiction is invoked under 28 USCS §1254(1) and 28 USCS §2101, n.13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in Appendix G.

STATEMENT OF THE CASE

It is, and was, the repeated denial of due process which caused this Petitioner to be persecuted, prosecuted, incarcerated and removed from the service of her government; the US Postal Service [PO]. As can be shown by the complete record:

1. On August 2, 1989, without a hearing by OWCP [in violation of 71 O.S. 3d 504], Petitioner was removed from workman's compensation rolls and put back under the jurisdiction of the PO; in order for the PO to prosecute Petitioner under 18 USC §1001 instead of 18 USC §1920 - citing U.S.A. v. Richardson, 9th Circuit Court, October 28, 1993.

This was accomplished through denial of due process, proven false written statements, along with repeated and now verified misdiagnoses, misleading information, and a "bogus" job offer by the PO (not in good faith).

These acts were in direct violation of 71 O.S. 3d 504; 5 CFR §2425.1(b); 5 USC §7116(a)(1),(8); 5 USC §7122; 5 USC §8106(c)(2) – regulations contained in 20 CFR §10.124; Section 8(d) National Labor Relations Act – contained in 29 USC section 158(d), good faith; ORC §2317.02; 5 USCS §2301(b)(9); 5 USCS §2302.

Also, the Employee - Labor Relations Manual (ELM) #547.33 and 547.34(c) states, "No employee shall be removed (from OWCP rolls) or their benefits affected until the medical issues are resolved."

2. On August 3, 1989, a letter of removal was issued by the PO.

3. On February 18, 1991, Arbitrator Rimmel ordered

physical and psychological examinations of this Petitioner.

If Petitioner were found to be fit, she was to be returned to service and made whole.

The PO and Arbitrator Rimmel were aware of an MRI dated March 8, 1990 when Arbitrator Rimmel passed down his award of February 18, 1991.

4. The PO blatantly ignored binding arbitration and made a conscious effort to violate:

5 CFR §2425.1(b) - which states that exceptions to arbitrator's awards are to be filed within 30 days. Which the Post Office DID NOT DO!

5 USC §7116(a)(1),(8) which states that a failure of an agency to implement arbitration award constitutes a violation, where no stay of award was requested, thus making the award final and binding.

And failure to implement an arbitrator's award constitutes an unfair labor practice under 5 USC §7116, §7122.

This Petitioner is held to the letter of the law on timeliness, then who is (or isn't) holding the PO to the letter of the law by not timely filing exceptions?

5. On April 10, 1991 Petitioner's attorney of record at that time, John Korfhagen, wrote a letter to Arbitrator Rimmel informing him of a non-compliance "impasse" by the PO.

Only the PO knew whether or <u>not</u> they were going to implement the arbitration award! Any American citizen should be able to expect their Government to abide by Federal laws!!

A copy of this letter was sent to the local PO representative Tom Lang.

6. The very next day, April 11, 1991, a second removal was issued by the PO.

Instead of complying with binding arbitration, the PO issued a 2nd removal <u>51 days</u> after the 1st arbitration award with the intention of nullifying their past procedural errors.

The second removal [dated April 11, 1991] is nothing more than an attempt by the PO to overcome the final and binding arbitration decision of Arbitrator Rimmel dated February 18, 1991.

Clearly, this is a violation of procedural due process.

Case law provides that an employer cannot escape a final and binding arbitration decision by instituting a second removal based upon the same conduct. Wilks v. American Bakeries Co. 87 Labor Arb Rep 707; 116 Labor Rel Manual 2687 (5-3-83).

7. Had the PO implemented the 18 Feb. 91 arbitration award, as required by law, the ordered exams would have certainly shown the same results as the MRI dated March 8, 1990 - that there was an on-going disability that resulted from an "on the job injury."

AND this on-going disability has existed up to and including this date - as can be proven by the newly discovered evidence, which was unavailable prior to the close of the record by MSPB.

THUS, if the PO had implemented the arbitration award, their case would have gone right out the window as a jurisdiction issue existed.

8. Had MSPB considered the medical evidence, as the arbitrator did, timeliness would not have been an issue.

MSPB Judge Detjen would have seen that due process had been denied from the very beginning. [By OWCP not granting Petitioner a hearing as per 71 O.S. 3d 504]

9. The US Court of Appeals for the Federal Circuit also refused to consider the complete and relevant record, as previously stated.

10. MSPB Administrative Judge Mary L. Detjen stated in her INITIAL DECISION, Docket #CH-0752-93-0577-I-1, dated September 13, 1993, on page 1 [under Introduction] "The Board has jurisdiction over this appeal. See 5 U.S.C.A. §§7511-7513 (West 1980)." [Petitioner's Appendix D].

A. Section 5 USCS §7121(d) provides that the selection of the negotiated procedure will not prejudice the right of the employee to appeal a "final decision" to the MSPB in the case of a personnel action that otherwise could be appealed to the Board (e.g. a "mixed" case). Thus, in discrimination matters handled under a negotiated procedure, the arbitrator's decision will become the "final agency action" and under Section 717 of

Title VII of the Civil Rights Act of 1964, such decision allows the employee to appeal. The authority of the MSPB to review final agency actions, which may be arbitrator's awards, stems from 5 USC §7702 which refers solely to matters which are appealable to MSPB involving an allegation that the action was discriminatory ("mixed case").

B. Under 5 USCS §7121, n 23 - "Claim of prohibited discrimination filed with Board by aggrieved employee transcends and is exception to restriction in §7121 on appeal to Board after he has grieved his removal through arbitration, and Board has jurisdiction of claim and is required by statutes to decide. Jones v. Department of Navy, (1990, CA FC) 898 F2d 133, 52 BNA FEP Cas 625. 53 CCH EPD ¶39748."

This clearly states that as a "preference eligible", Petitioner is entitled to file with the MSPB AFTER she had grieved a second removal THROUGH arbitration; that MSPB had jurisdiction, and was bound by law, to hear her "mixed case" appeal as it was timely filed on August 16, 1993.

C. On page 2 of the PO's "Motion to Dismiss" filed with MSPB under date of August 27, 1993, Richard Acker [PO rep] states:

> "a decision was rendered concerning Appellant's grievance appeal on July 23, 1993 by Arbitrator Carl F. Stoltenberg. The Appellant's appeal was denied, and the agency's action upheld. The Appellant was separated from the rolls of the agency, effective the date of the arbitration award."

* The PO used July 28, 1993 to issue a Form 50 and terminate Petitioner from the postal service.

* Petitioner used July 28, 1993 as the date to compute the timeliness of filing with MSPB (20 days from July 28, 1993 falls on August 16, 1993).

11. MSPB issued it's "final decision" on January 12, 1994 [Appendix E] - Petitioner's appeal was denied on a timeliness issue.

Despite due diligence, the newly discovered evidence was unavailable and not submitted for consideration, prior to the

closing of the record by MSPB.

This evidence is of sufficient weight to warrant an outcome different from that of the "initial decision" by MSPB [Appendix D].

12. The US Court of Appeals denied Petitioner's Motion of Nunc Pro Tunc on April 6, 1995 [Appendix B].

MSPB had submitted selected parts of the record for that Court's consideration. Not the whole record.

Without reviewing the complete record, to include the newly discovered evidence, due process has been denied this Petitioner; Starting with the Post Office, OWCP and MSPB, continuing up to and through the US Court of Appeals for the Federal Circuit.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in order that due process, guaranteed under the Fourteenth Amendment to the United States Constitution [Appendix G] be granted to this Petitioner. As the right to due process has been repeatedly denied throughout this entire case.

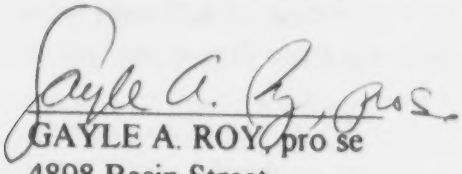
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this matter.

If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the US Court of Appeals for the Federal Circuit for a review of the complete record, including the newly discovered evidence.

DATED: August 31, 1995.

Respectfully submitted,



GAYLE A. ROY, pro se
4898 Basin Street
West Chester, Ohio 45069
(513) 860-3098

US COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Notice of Entry of Judgment
Without Opinion

Judgment Entered: June 12, 1995

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petition for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitoner(s) in favor of the Respondent(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

Francis X. Ginderhart
Clerk

cc: Gayle A. Roy
Melissa A. Pollack

ROY V MSPB, 95-3253 (MSPB - CH0752930577I-1)

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

US COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-3253

Gayle A. Roy, Petitioner

v.

Merit Systems Protection Board, Respondent

JUDGMENT

On Appeal from the Merit Systems Protection Board in Case No(s) CH0752930577-I-1. This Cause having been heard and considered, it is Ordered and Adjudged:

Per Curiam: (RICH, PLAGER, and CLEVENGER, Circuit Judges): AFFIRMED. See Fed. Cir. R. 36

ENTERED BY ORDER OF THE COURT

Dated Jun 12 1995 s/Francis X. Gindhart pt

Francis X. Ginderhart, Clerk

Filed

US Court of Appeals for the

Federal Circuit

Jun 12 1995

Francis X Ginderhart, Clerk

ISSUED AS A MANDATE: August 3, 1995

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

US COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-3253

Gayle A. Roy, Petitioner

v.

Merit Systems Protection Board, Respondent

ON MOTION

Before BRYSON, Circuit Judge.

ORDER

Gayle A. Roy moves to supplement the record on review.

Roy requests that documents that were not before the Merit Systems Protection Board be included in the record on review. However, this court is reviewing what the Board did in this case and our review is confined to the record before the Board. See Fed. R. App. 16(a) (the record on review is comprised of the order sought to be reviewed, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency).

Accordingly,

IT IS ORDERED THAT:

Roy's motion is denied.

4/6/95
Date

s/William C. Bryson
William C. Bryson
Circuit Judge

cc: Gayle A. Roy
Melissa A. Pollack, Esq.

Filed
US Court of Appeals for
the Federal Circuit
Apr - 7 1995
Francis X. Gindhart
Clerk

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Filed
Kenneth J. Murphy
Clerk
Feb 1 3:35PM '95

GAYLE A. ROY,
Plaintiff,

V.

UNITED STATES POSTAL SERVICE, et al.
Defendants.

Case No. C-1-94-088
ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION AND TRANSFERRING CASE

This matter is before the Court on the Magistrate Judge's Report and Recommendation (doc. 17), to which the Plaintiff has objected.

The Plaintiff, who brings this action pro se, is a former United States Postal Service worker who claims to have been discharged unfairly. The Plaintiff filed a grievance which was decided against her. She then filed an appeal with the Merit Systems Protection Board (MSPB). The MSPB dismissed her appeal as untimely. She also contended that she was a victim of handicap discrimination.

In reviewing the Plaintiff's claim the Magistrate Judge points out the proper forum for review of the Plaintiff's appeal of the threshold jurisdictional ruling by the MSPB is the Court of Appeals for the Federal Circuit. See Ballentine v. Merit System Protection Board, 738 F.2d 1244, 1246-47 (Fed. Cir. 1984). Turning to the Plaintiff's handicap discrimination claim, the Magistrate Judge reports that in cases where there is a mixed question of discrimination and an appeal of a MSPB jurisdictional ruling, a party may proceed to a district court. 5 U.S.C. §7703(b). However, prior to initiating a discrimination action in a district court, federal employees must pursue their allegations either through the EEOC or the MSPB. Plaintiff

filed with the MSPB. However, as we have just seen above, that MSPB action was dismissed as untimely. Therefore, the Magistrate Judge recognized that the issue of the timeliness of the Plaintiff's administrative claim before the MSPB, is the threshold issue of both her claims. Since we do not have jurisdiction over this issue, the Magistrate Judge recommends that we transfer this case to Federal Circuit. See 28 U.S.C. §1631.

Having reviewed this matter de novo pursuant to 28 U.S.C. §636, we find that the Magistrate's Report and Recommendation is correct.

Accordingly, we ADOPT Magistrate Judge's report and AFFIRM the Magistrate Judge's recommended decision. We hereby TRANSFER this matter to the United States Court of Appeals for the Federal Circuit.

SO ORDERED.

Dated: 1/31/95

s/S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

I certify that this is a true and
correct copy of the original filed
in my Office on 2/1/95.
KENNETH J. MURPHY, CLERK
BY: s/Vicki Penley
Deputy Clerk
Date: 2/2/95

A-6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Filed
Kenneth J.Murphy
Clerk
Feb 1 3:57PM '95

Gayle A. Roy
Plaintiff(s),

v.

C-1-94-088

United States Postal Service, et al
Defendant(s).

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Accordingly we ADOPT MJ report and AFFIRM the MJ recommended decision; this case is hereby TRANSFERRED to the United States court of Appeals for the Federal Circuit.

February 1, 1995

Kenneth Murphy, Clerk
Deputy Clerk
s/Vicki Penley

I certify that this is a true and correct copy of
the original filed in my Office on 2/1/95.
KENNETH J. MURPHY, CLERK
By: s/V Penley
Deputy Clerk
Date: 2/3/95

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

Gayle A. Roy,
Appellant,

v.

United States Postal Service,
Agency.

DOCKET NUMBER
CH-0752-93-0577-I-1

Date: September 13, 1993

Gayle A. Roy, West Chester, Ohio, pro se.
Richard L. Acker, Cincinnati, Ohio, for the agency.

BEFORE

Mary L. Detjen
Administrative Judge

INITIAL DECISION

INTRODUCTION

On August 16, 1993, the appellant appealed from the agency's decision to remove her, effective April 20, 1991, for unacceptable conduct. The Board has jurisdiction over this appeal. *See* 5 U.S.C.A. §§7511-7513 (West 1980).

For the reasons discussed below, this appeal is DISMISSED.

TIMELINESS

An appeal from an agency's action must be filed within 20 days of the effective date of the action. *See* 5 C.F.R. §1201.22(b) (1993). If an appellant does not submit the appeal within the time limit, it will be dismissed unless the appellant establishes good cause for the untimely filing. *See* 5 C.F.R. §1201.22(c) (1993).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Gayle A. Roy,
Appellant,

DOCKET NUMBER
CH-0752-93-0577-I-1

v.

United States Postal Service,
Agency.

Date: Jan 12 1994

Gayle A. Roy, West Chester, Ohio, pro se.
Helen A. Nicholas, Philadelphia, Pennsylvania, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on September 13, 1993, because it does not meet the criteria for review set forth at 5 C.F.R. §1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. §7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. §7703(b)(1).

FOR THE BOARD:

s/----------

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CINCINNATI SPORTSMEDICINE AND ORTHOPAEDIC CENTER

Date: 7/11/95

Location: One Lytle Place, Cincinnati, Ohio 45202

Patient name: GAYLE ROY

Ms. Roy comes back in today for follow-up on the left knee problem. She is diagnosed as having left saphenous neuritis and left patellofemoral arthrosis on that side. Her problems all commenced November 28, 1985 when had an injury to her left knee. Since that time she has had symptoms of saphenous nerve reflex syspathetic dystrophy (RSD). She has received treatment for that medically to this point. She has also had patellofemoral arthrosis treated by surgery. She underwent arthroscopy of her left knee 11/3/93.

Today she comes back in with an interest in transferring her care from Dr. Noyes to Dr. Broadnax. This is being done at the request of the Department of Labor. She also requests a very specific statement as to what her prognosis, specific injury, and ailment are.

PHYSICAL EXAMINATION today reveals a left knee that has no effusion. She has full flexion of that knee. She does have some mild lateral joint line tenderness. Otherwise, her tenderness is to palpation along the pes anserinus tendon. She does have saphenous impingement type symptoms with pressure in the posteromedial aspect of her left knee. Examination of her calves reveal hypersensitivity along the saphenous distribution starting approximately 2 to 3 cm. below the joint line and extending distally. Examination of the patellofemoral joint reveals moderate crepitance in it. There is only mild pain to patellar compression.

IMPRESSION:

Left saphenous neuritis with possible entrapment symptoms and/or sympathetically maintained syndrome. All these are symptoms referable

back to her original injury in 1985.

She is currently under the care of Dr. Broadnax and, in fact, we believe this is the appropriate place for her to continue getting her regular care. We believe this because, right now, her saphenous neuritis is her major complaint. We also feel, at the present time, the patellofemooral arthrosis has had all possible treatment orthopaedically performed. Furthermore, with her saphenous neuritis, though it is not full at this time, we do not wish to inflame it or exacerbate those symptoms at all by proceeding with left knee procedures.

Given the situation, we would like to transfer her care to Dr. Broadnax. We also would like her to re-start her patellofemoral exercise program when she is cleared for that by Dr. Broadnax.

We would like to see her in consultation.

CARL W. NISSEN, M.D.
CLINICAL ASSOCIATE

FRANK R. NOYES, M.D.

wby
R: 7/12
T: 7/14

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Service - Constitution Amendments 13 - End Index

Amendment 14, n 21 —

Touchstone of due process is protection of individual against arbitrary action of government. Wolff v. McDonnel, (1974) 418 US 539, 41 L. Ed 2d 935, 94 S Ct. 2963, 71 Ohio Ops 2d, 336.